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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. SHAWN McNARY, Defendant and Appellant.	C057916 (Super. Ct. No. 17350C)

Shawn McNary appeals from an indeterminate civil commitment to the State Department of Mental Health (the Department) after he was found to be a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA; Welf. & Inst. Code, § 6600 et seq.).[1] He contends the trial court prejudicially erred in allowing the People's two psychologists to testify in detail about hearsay statements contained in police reports regarding uncharged offenses as part of the basis for their expert

[1] Hereafter, undesignated statutory references are to the Welfare and Institutions Code.

opinions. He further contends that his indeterminate commitment violates due process, the ex post facto clause and equal protection. Finally, he claims his commitment must be reversed because the evaluations supporting the SVP petition were invalid because the Department's standardized assessment protocol governing them was an invalid "underground regulation," having been adopted without compliance with the Administrative Procedures Act (APA; Gov. Code, § 11340 et seq.). We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1992, McNary pled no contest to 16 charges against four victims: (a) burglary and assault with the intent to commit rape against Marnie P. on September 7, 1991; (b) burglary, robbery, three counts of forcible oral copulation, two counts of assault with intent to commit rape and one count of rape by a foreign object against Candy M. on September 13, 1991; (c) burglary and assault with the intent to commit rape against Val R. on September 17, 1991; and (d) burglary, two counts of rape and one count of forcible oral copulation against Katrina (sometimes referred to as Carina) on September 17, 1991. McNary admitted two prior burglary convictions, one in 1988 and one in 1990. In exchange for his plea, McNary was sentenced to prison for 20 years.

McNary was released on parole in March 2005 as a high-risk sexual offender. One of the conditions of his parole was that he not possess pornography. A month later, in April 2005, authorities found an adult pornographic magazine under McNary's

bed during a routine search. McNary did not contest parole revocation proceedings and was returned to prison for the violation.

In November 2005, the District Attorney for San Joaquin County filed a petition seeking civil commitment of McNary as an SVP for a period of two years. In March 2006, the trial court found probable cause to believe McNary fit the criteria for commitment (§ 6602) and ordered that the matter be set for trial.

"On September 20, 2006, the Governor signed the Sex Offender Punishment, Control, and Containment Act of 2006, Senate Bill No. 1128 (2005–2006 Reg. Sess.) (Senate Bill 1128). (Stats. 2006, ch. 337.) Senate Bill 1128 was urgency legislation that went into effect immediately. (Stats. 2006, ch. 337, § 62.) Among other things, it amended provisions of the SVPA to provide the initial commitment set forth in Welfare and Institutions Code section 6604 was for an indeterminate term. (Stats. 2006, ch. 337, § 55.)" (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1280-1281 (*Bourquez*).) Then, at the November 7, 2006 General Election, the voters approved Proposition 83, known as "'The Sexual Predator Punishment and Control Act: Jessica's Law,'" that further amended the SVPA and required an indeterminate commitment. (*Bourquez, supra,* at p. 1281.) In December 2006, the trial court granted the People's motion to amend the petition to seek an indeterminate commitment of McNary pursuant to amended section 6604.

A jury trial on the amended petition commenced in November 2007. The prosecution presented the opinions of two psychologists, Dr. Amy Phenix and Dr. Christopher Matosich.

The Testimony:

Dr. Phenix opined that McNary meets the criteria for an SVP. His convictions for rape, forcible oral copulation, rape by a foreign object and assault with intent to commit rape against four separate victims were qualifying prior sexually violent offenses. Phenix diagnosed McNary with three mental disorders: paraphilia not otherwise specified (NOS), nonconsenting females; polysubstance dependence; and antisocial personality disorder. Phenix reached her diagnostic conclusion based on an analysis of McNary's sexual development and the pattern and duration of McNary's history of sex offending, which included his arrests, convictions, and a number of incidents of uncharged conduct. Phenix considered McNary more paraphilic and deviant than other individuals who commit serial rapes because his victims ranged in age from 18 to 78 and because he made multiple attempts to offend in one night. Even though McNary's offenses occurred in 1991, Phenix still believed McNary had paraphilia and that he was a high risk to reoffend. Without intervention and treatment his risk would not be reduced.

Dr. Matosich also opined McNary meets the criteria for SVP. McNary had several convictions for sexually violent predatory crimes. Matosich diagnosed McNary as suffering from paraphilia NOS, as well as polysubstance dependence and antisocial personality disorder. He considered McNary to have severe

sexual deviancy based on his pronounced and callous behaviors demonstrated over a significantly long period of time as shown by his prior convictions, arrests and charges. Matosich was confident McNary still has severe paraphilia that cannot be appropriately treated on an outpatient basis. McNary has a high risk to reoffend.

McNary admitted the rapes for which he was convicted, but denied all uncharged misconduct contained in the police reports. He claimed the rapes for which he was convicted were spontaneous, not planned. He claimed his only purpose was burglary, although Parole Agent Philip Mounts noted McNary hardly stole anything during the burglaries. McNary denied or minimized the uncharged misconduct and prior arrests relied on by Phenix and Matosich in making their diagnoses of his mental disorder. McNary claimed there was no danger that he would rape again because he has acknowledged it is wrong and it is not part of his character.

Dr. Mary Adams, a clinical psychologist, testified for McNary. She evaluated McNary and concluded he did not suffer from paraphilia. Adams testified simple repetition of rapes does not necessarily demonstrate paraphilia. Paraphilic behavior is really well organized, planned carefully, follows a specific pattern and is repetitive. A paraphilic would often have a "rape kit" consisting of items such as handcuffs, duct tape or rope. McNary did not bring a rape kit with him, but used items found in the homes to subdue his victims. She did not see a high degree of preplanning in McNary's offenses, which

were committed under the influence of drugs or alcohol and in the context of burglary/robbery. There was little indication McNary became more aroused by his victim's noncompliance or nonconsent. Adams did not see manifestations of paraphilia while McNary was in prison.

Dr. Theodore Donaldson, another clinical psychologist, testified for McNary. He evaluated McNary and opined that there was insufficient evidence to conclude McNary met the criteria of an SVP.

The jury found McNary is a sexually violent predator within the meaning of the SVPA. Based on that finding, the trial court committed McNary to the Department for appropriate treatment and confinement for an indeterminate term.

DISCUSSION

I.

The Trial Court Did Not Abuse Its Discretion In Allowing Phenix And Matosich To Testify Regarding Uncharged Offenses As Part Of The Basis For Their Diagnoses

Background:

The People filed a pretrial motion in limine to allow all hearsay evidence relied upon by the experts in forming their opinions to be admitted at trial. The evidence included the following arrests, convictions and uncharged offenses. We set them out in chronological order.

In 1985 or 1986, when McNary was 19 years old, he was arrested for peeping into an inhabited dwelling. His pants were undone at the time.

The next year he was arrested for indecent exposure.

On June 1, 1990, between 1:30 and 2:15 a.m., 19-year-old Jeanine[2] was asleep in bed with her three-year-old son. She was sleeping in the nude and was awakened when a man jumped on her back. Jeanine reported the man put a knife to her throat and forced her to engage in acts of sexual intercourse, oral copulation and sodomy. Defendant was charged and convicted of burglary in connection with the incident.[3] Defendant was sentenced to prison. He was released in August 1991.

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[2] Jeanine was sometimes referred to as "Jeannie." The trial court found the correct name of the victim in this incident was Jeanine.

[3] At the hearing on the People's motion in limine, the trial court asked how McNary was connected to the sexual offenses against Jeanine. The People responded that McNary was interviewed by police regarding the rape and that defendant's records reflected he was convicted of burglary in connection with the incident. The People referenced both a specifically identified police report and defendant's certified records of conviction. Counsel for McNary did not argue the records failed to show the burglary conviction was related to the incident with Jeanine. Instead, counsel noted the conviction was a result of a plea bargain and suggested that left McNary's connection to the rape uncertain. In allowing the admission of the evidence based on the connection to defendant's burglary conviction, the trial court implicitly found the burglary was committed in connection with the sexual offenses Jeanine reported. Although the court and counsel commented that the records they were referencing should be marked as the next-in-order court exhibit, the records, if so marked, were never transmitted to this court as part of the record on appeal. (Cal. Rules of Court, rule 8.320(e).) On this record, we presume the referenced evidence supported the trial court's conclusion. It is McNary's burden to provide a record that affirmatively establishes otherwise. (*People v. $17,522.08 United States Currency* (2006) 142 Cal.App.4th 1076, 1084; *People v. Sanghera* (2006) 139

On September 6, 1991, at approximately 3:00 a.m., 78-year-old Mary M. opened her front door to look outside. A man appeared on her porch and forced his way inside. The man took Mary to the bedroom and threw her on the bed. He removed her clothing; his pants were already unbuttoned and unzipped. He tried to force Mary to orally copulate him. When she screamed and struggled, the man threatened to kill her. He had a knife and in the struggle, Mary's hands were cut. The man then raped and attempted to sodomize Mary. When the man ran from the house, Mary went to a neighbor's house for help. She told investigators her assailant smelled like he had been drinking, that he was a Black male, 14 to 18 years old, 5 feet 6 inches tall, black hair and medium build. Mary did not identify McNary as her assailant in a photographic lineup.

One day later, on September 7, 1991, at about 2:15 a.m., 46-year-old Marnie P.[4] was asleep on her living room couch when she was awakened by a man attempting to pull up her blouse. When she opened her eyes, she saw McNary standing over her. She screamed and McNary ran out of her house. McNary's fingerprints were found at the scene. Marnie P. identified McNary as her assailant in a photographic lineup. Defendant pled no contest to burglary and assault with the intent to commit rape.

Cal.App.4th 1567, 1573.) At trial, McNary testified his conviction for that burglary involved a different location unrelated to Jeanine.

[4] Marnie P. was referred to as Marine in Matosich's report.

Less than two hours after the incident involving Marnie P., on September 7, 1991, at 4:00 a.m., 38-year-old Sheri P. woke up to find a man standing next to her bed, taking off his shirt. The man said, "Don't say anything." Sheri P. screamed and the man ran out of the room. Sheri P. was unable to positively identify McNary in a photographic lineup, but picked McNary and another man as possible suspects.

On September 13, 1991, between 3:00 and 5:30 a.m., 18-year-old Candy M. was asleep in her bedroom. She was awakened by McNary coming into the room and holding a pillow over her face. McNary put a pair of nylons over Candy's eyes. When Candy began screaming, McNary threatened to hurt her and told her she had the choice to "fuck me or suck my dick." When Candy refused, McNary threatened to go to the kitchen and get a knife to kill her. McNary forced Candy to orally copulate him and then orally copulated her. When Candy tried to run out of the bedroom to the bathroom, McNary grabbed her and pulled her back to the bedroom where he again forced her to orally copulate him. He also put his finger inside of her. Candy was ultimately able to escape to the bathroom where she secured the door. McNary ran out of the house. Candy's purse was missing cash after the incident. Defendant pled no contest to burglary, robbery, three counts of forcible oral copulation, two counts of assault with the intent to commit rape, and one count of rape by a foreign object.

On September 17, 1991, around 2:00 a.m., 35-year-old Sherri R. awoke to find a man standing at the foot of her bed.

He had a bedspread draped over his head. Sherri screamed and the man left the room. Sherri was not able to positively identify McNary in a photographic lineup, but did indicate McNary's picture resembled her assailant. Officers found a shoe print at the scene that was similar to defendant's shoes.

On September 17, 1991, still around 2:00 a.m., 59-year-old Val. R. was lying in bed watching television when McNary appeared in her bedroom. McNary walked toward the bed and unzipped his pants. He removed a towel from Val's crotch area. Val screamed and called 911. McNary fled. Val identified McNary in a lineup. McNary pled no contest to burglary and assault with the intent to commit rape.

That same morning on September 17, 1991, around 5:00 a.m., 24-year-old Katrina was asleep on her living room couch. She awoke when McNary put a pillow against her face. McNary told Katrina he knew her son was asleep in the bedroom and if he awoke he would get hurt. Katrina saw McNary when he lifted the pillow up. McNary smelled of alcohol. McNary raped Katrina, forced her to orally copulate him, and then raped her again. McNary patted something shiny in his back pocket, which Katrina believed to be a weapon. McNary asked her when her "husband" got home. He had apparently been watching the home to see "the comings and goings." When Katrina said her boyfriend was due home, McNary left. McNary pled no contest to burglary, two counts of rape and one count of forcible oral copulation.

McNary objected to the doctors testifying about any crime for which he was not convicted.

The trial court went through each of the uncharged offenses described in the police reports used by the doctors' reports in their evaluation of McNary as an SVP. The trial court found McNary was connected to the offense involving Jeanine by his burglary conviction related to that incident. The trial court ruled the evidence was more probative than prejudicial under Evidence Code section 352 (section 352). The trial court found McNary was connected to the offense involving Mary through its timing and great similarity to the other assaults. The trial court allowed testimony regarding Mary, concluding the high probative value of the evidence outweighed its prejudice. The trial court found there was a sufficient nexus between McNary and the incident involving Sheri P. as Sheri P. had identified McNary and another man as a possible suspect. The evidence was admissible under section 352. Similarly, Sherri R. identified McNary's picture as resembling her assailant, making testimony regarding this incident admissible.

In line with these rulings, Dr. Phenix testified at trial that she reached her diagnostic conclusion based on an analysis of defendant's sexual development and the pattern and duration of defendant's history of sex offending. This included defendant's admission to between 30 and 40 sexual partners in his teenage years and early 20's. It included defendant's arrest for peeping into an inhabited dwelling and his arrest for indecent exposure. Phenix considered and described the uncharged offenses involving Jeanine, Mary M., Sheri P. and Sherri R. She considered and described the incidents involving

Marnie P., Candy M., Val R., and Katrina, for which defendant was convicted. At no point did McNary object that Phenix's description of any incident misstated the information in the police reports. Nor did McNary object to the level of detail given by Phenix.

Prior to the testimony of Dr. Matosich, the trial court confirmed its ruling allowing Matosich to testify regarding the uncharged offenses involving McNary. Matosich testified that his opinion regarding McNary was based in part on McNary's behavior demonstrated over a long period of time, including the uncharged offenses. With respect to the offense involving Mary, Matosich specifically testified he believed her assailant was most likely McNary, even though Mary could not identify McNary, because there were so many traits and behaviors similar to the other incidents.

As to the experts' testimony, the trial court gave the jury limiting instructions on two occasions. It told the jury, prior to Phenix's testimony regarding Mary M., that "[t]he experts can come and give an opinion based on documents they read. They are not here to tell you they were there. So an expert's opinion is not for the truth of what is there, but I'll allow the information of the records they reviewed to explain their opinions. It will be the same for every expert. Like a doctor sat down, said I wasn't there when the guy had his heart attack, but I read the records, I have an opinion. The doctor is not here to testify for the truth, but the records are allowed for the limited purpose of explaining the basis of her opinion." At

the conclusion of the trial, the trial court instructed the jury that "[i]n forming an expert opinion on issues in controversy, an expert may rely on a wide variety of materials, including documents, reports and the opinions of others. You may consider the evidence upon which the experts base their respective opinions not for the truth of the matters asserted but solely as the basis upon which the experts formed their respective opinions."

Analysis:

McNary claims on appeal that the trial court failed to properly exercise its discretion in deciding whether the experts could testify about the hearsay statements regarding uncharged offenses contained in the police reports when it employed the wrong analysis by focusing solely on a possible nexus between the crimes and McNary. McNary argues that hearsay statements used by experts as the basis of their opinions in an SVP proceeding require "special indicia of reliability to satisfy due process" (*People v. Otto* (2001) 26 Cal.4th 200, 210 (*Otto*)), which the statements regarding the uncharged offenses used here lacked. McNary also argues the trial court erred in failing to limit the extent to which the experts testified about the details of the uncharged offenses. We disagree with these claims and conclude the trial court did not abuse its discretion in allowing Phenix and Matosich to testify regarding their use of the uncharged offenses as part of their evaluation of McNary.

Evidence Code section 801 provides that opinion testimony of an expert witness "is limited to such an opinion as is:

[¶] . . . [¶] (b) Based on matter . . . perceived by or personally known to the witness or *made known to him at or before the hearing, whether or not admissible*, that is of a type that *reasonably may be relied* upon by an expert in forming an opinion upon the subject to which his testimony relates, . . .” (Italics added.)

Thus, expert testimony may be premised on material that is not admitted into evidence so long as the material is reliable and of the type reasonably relied upon by experts. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Indeed, as long as the “threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible [such as hearsay] can form the proper basis for an expert’s opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to ‘state on direct examination the reasons for his opinion and the matter . . . upon which it is based,’ an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]” (*Ibid.)*

“However, prejudice may arise if, ‘“under the guise of reasons,”’ the expert’s detailed explanation ‘“[brings] before the jury incompetent hearsay evidence.”’ (*People v. Nicolaus* (1991) 54 Cal.3d 551, 583 [286 Cal.Rptr. 628, 817 P.2d 893], quoting *People v. Coleman* (1985) 38 Cal.3d 69, 92 [211 Cal.Rptr. 102, 695 P.2d 189].)” (*People v. Montiel* (1993) 5 Cal.4th 877, 918-919 (*Montiel*).) “‘Most often, hearsay problems will be cured by an instruction that matters admitted through an expert

go only to the basis of his opinion and should not be considered for their truth. [Citation.] [¶] Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]' [Citation.]" (*People v. Bell* (2007) 40 Cal.4th 582, 608 (*Bell*).)

"Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*Montiel, supra,* 5 Cal.4th at p. 919.) We review the trial court's ruling for abuse of discretion. (*Bell, supra,* 40 Cal.4th at pp. 607, 609; *People v. Nicolaus, supra,* 54 Cal.3d at p. 582.)

Here the hearsay statements contained in the police reports regarding the uncharged offenses committed against Jeanine, Mary M., Sheri P. and Sherri R. were the type of material on which a psychologist evaluating an individual for purposes of the SVPA would reasonably rely. (See *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 151-155; *People v. Miller* (1994) 25 Cal.App.4th 913, 917-918; *People v. Mazoros* (1977) 76 Cal.App.3d 32, 44.) Such material was necessary for the experts to consider in order to have a complete picture of McNary for

purposes of their evaluation. (See *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524.)

In considering the reliability of the specific statements, the trial court properly focused on whether there was a sufficient showing that McNary was the assailant in each of the uncharged offenses. There was no other dispute regarding their reliability. For example, no one questioned whether the events described actually occurred, whether the victims were mature enough to accurately report the events, whether they promptly did so or whether the police accurately recorded the victim's statements. The issue presented to the trial court was solely whether McNary committed the uncharged offenses. The trial court did not abuse its discretion in concluding that there was evidence, in each incident, that connected McNary to the crimes committed. The trial court found McNary was connected to the sexual offenses committed against Jeanine because he was convicted of burglary in connection with those offenses.[5] McNary was connected with the sexual offenses committed against Mary through the timing and strong similarity of the assaults. Sheri P. identified McNary and one other man as possibly her assailant. Sherri R. identified McNary as resembling her assailant.

To the extent *Otto, supra,* 26 Cal.4th at pages 210-211, may be read as requiring "special indicia of reliability to satisfy

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[5] See footnote 3, *ante.*

due process[,]" we also conclude there was such special indicia here. The chronology of the dates, the early morning hours of the offenses, and the perpetrator's knowledge that the victim was without adult companionship at the time of the attacks were factors uniting the uncharged offenses with the charged offenses suggesting a very strong inference that defendant was responsible. As the trial court recognized, the uncharged offenses closely fit the timing and pattern of the offenses defendant admitted by his pleas of no contest.

Importantly, the trial court provided limiting instructions to the jury regarding its use of the reports relied on by the experts both during the examination of the first psychologist to testify (Phenix) and at the conclusion of trial. Moreover, McNary had the opportunity to question the experts on why they included the uncharged offenses as part of the basis for their diagnosis. He exercised this right in his cross-examination of Matosich.[6] During his own testimony, McNary had the opportunity to and did deny his involvement in any of the uncharged offenses.

We find no abuse of discretion in the trial court's ruling. The evidence of the uncharged offenses was not more serious and inflammatory than the offenses for which McNary was convicted.

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[6] McNary could have, but did not, object to any portion of Phenix's or Matosich's testimony as misrepresenting facts regarding the uncharged offenses. He did not cross-examine them as to any perceived inaccuracies. To the extent McNary is now claiming prejudice from any such misrepresentation, he has forfeited his claim. (Evid. Code, § 353.)

The jury was informed that McNary's identity as the assailant in the uncharged offenses was not definite. The nature of the uncharged offenses did not present so great a potential to unfairly prejudice defendant that a limiting instruction was insufficient to prevent improper use. (*People v. Coleman, supra,* 38 Cal.3d 69, 93.) The trial court's "weighing of prejudice and probativeness was not arbitrary or capricious." (*Bell, supra,* 40 Cal.4th at p. 609.) Section 352 did not require the exclusion of the evidence. (*Ibid.; People v. Coleman, supra,* at p. 93.)

We also reject McNary's claim that the trial court erred in failing to limit the extent to which the experts testified about the details of the uncharged offenses. Not only did McNary fail to object to any testimony that he felt was too detailed, thereby forfeiting the claim for appeal (Evid. Code, § 353), we have reviewed the reporter's transcript of the testimony of Phenix and Matosich and conclude the psychologists did not go into unnecessary detail.

The trial court did not err in allowing Phenix and Matosich to testify regarding the uncharged offenses as part of the basis for their diagnoses.

II.

The Indeterminate Commitment Order Does Not Violate McNary's Constitutional Rights To Due Process And Equal Protection Or Violate The Ex Post Facto Clause[7]

A. Due Process:

McNary contends his commitment for an indeterminate term, subject to only limited judicial review under sections 6605 and 6608, violated his due process rights. He claims the limited review provisions of the SVPA are not constitutionally adequate. We disagree.

Originally, the SVPA provided for a two-year civil commitment of any person who was tried and found beyond a reasonable doubt to be an SVP. (*People v. Williams* (2003) 31 Cal.4th 757, 764, cert den. sub. nom. *Williams v. California* (2004) 540 U.S. 1189 [158 L.Ed.2d 98].) Upon expiration of the two-year term, the term could be extended only if the government again proved in a jury trial, beyond a reasonable doubt, that the person remained an SVP. (Former §§ 6604, Stats. 1995, ch. 763, § 3; 6604.1, Stats. 1998, ch. 19, § 5.)

As noted before, the SVPA was amended in 2006 by Senate Bill No. 1128 and Proposition 83 to change the initial

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[7] These issues are pending before the California Supreme Court in *People v. McKee* (2008) 160 Cal.App.4th 1517, review granted July 9, 2008 (S162823); *People v. Johnson* (2008) 162 Cal.App.4th 1263, review granted August 13, 2008 (S164388); *People v. Riffey* (2008) 163 Cal.App.4th 474, review granted August 20, 2008 (S164711); *People v. Boyle* (2008) 164 Cal.App.4th 1266, review granted October 1, 2008 (S166167); *People v. Garcia* (2008) 165 Cal.App.4th 1120, review granted October 16, 2008 (S166682).

commitment from a two-year term to an indeterminate term. (*Bourquez, supra,* 156 Cal.App.4th at pp. 1280-1281.) Because the term of commitment is indeterminate, the government no longer has to prove at regular intervals, beyond a reasonable doubt, that the person remains an SVP. Instead, the Department must examine the person's mental condition at least once every year and must report annually on whether the person remains an SVP. (§ 6605, subd. (a).) If the Department determines the person is no longer an SVP, the director of the Department must authorize the person to petition the court for unconditional discharge. (§ 6605, subd. (b).) If, on consideration of such a petition, the court finds probable cause to believe the person is no longer an SVP, the court must conduct a hearing, at which the government has to prove beyond a reasonable doubt that the person is still an SVP. (*Id.*, subds. (c) & (d).) If the government meets that burden, the person must (once again) be committed for an indeterminate term. (*Id.*, subd. (e).) If the government does not meet its burden, then the person must be discharged. (*Ibid.*)

The only other avenue for release from confinement under the amended SVPA is a petition under section 6608. This statute remains substantially the same as before the enactment of Senate Bill No. 1128 and the passage of Proposition 83. Under section 6608, a person committed as an SVP may petition for conditional release or unconditional discharge without the recommendation or concurrence of the director of the Department. (§ 6608, subd. (a).) Such a petition may also be instituted by the director

under section 6607. In any hearing under section 6608, however, the petitioner has the burden of proof by a preponderance of the evidence. (§ 6608, subd. (i).)

As to McNary's basic contention that an indefinite commitment is necessarily unconstitutional, the United States Supreme Court has expressed no such constitutional concerns. (See *Jones v. United States* (1983) 463 U.S. 354, 368 [77 L.Ed.2d 694, 708] (*Jones*); see also *Addington v. Texas* (1979) 441 U.S. 418, 425-426 [60 L.Ed.2d 323, 330-331] (*Addington*).)

McNary contends, however, the review procedures under the amended SVPA are inadequate. As to the first procedure, by which the Department authorizes a person to petition for discharge or conditional release, McNary complains the Department retains sole discretion and may prevent a hearing from ever taking place by simply not filing a petition. There is no basis in the record or otherwise for speculating that the Department will not fairly assess the mental condition of a person committed as an SVP when called upon to do so. Moreover, section 6608 allows a person to petition for discharge without the concurrence or recommendation of the Department.

McNary contends this second alternative is inadequate because the person is not entitled to the assistance of an expert and has the burden of proof. The absence of an express provision in section 6608 for the assistance of an expert presents no due process concern because such a right is provided for in section 6605. Section 6605 requires the Department to report annually on a committed SVP's mental condition. (§ 6605,

subd. (a).) The statute also provides that "[t]he person may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person." (*Ibid*.) Thus, if the Department, in its annual report, concludes the person remains an SVP, that person can request appointment of an expert to review that determination. If the expert concludes contrary to the Department, the person can use the expert's testimony to support a petition for discharge under section 6608.

McNary also challenges the requirement that he bear the burden of proving his right to release by a preponderance of the evidence. He argues *Addington, supra,* 441 U.S. 418 [60 L.Ed.2d 323] should govern the procedures held pursuant to section 6608. To the contrary, we conclude the statutory procedure, including the burden of proof under section 6608, subdivision (i), is more analogous to that at issue in *Jones, supra,* 463 U.S. 354 [77 L.Ed.2d 694]. In *Jones*, the high court considered a statutory scheme under which a person committed to a mental hospital after a finding of not guilty by reason of insanity was entitled to a judicial hearing to determine his eligibility for release at which he had the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. The court found no due process violation in placing the burden of proof on the person committed. (*Id*. at pp. 366-368.) We find no due process violation here.

B. Ex Post Facto:

McNary contends the amendments of the SVPA by Proposition 83 renders the SVPA punitive in nature and therefore the application of the amended SVPA to him violates the constitutional prohibitions against ex post facto laws. Not so.

"[T]he ex post facto clause prohibits only those laws which 'retroactively alter the definition of crimes or *increase the punishment for criminal acts.*' [Citations.] The basic purpose of the clause is to ensure fair warning of the consequences of violating penal statutes, and to reduce the potential for vindictive legislation. [Citation.] The federal and state ex post facto clauses are interpreted identically." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1171 (*Hubbart*).)

In *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501] (*Hendricks*), the United States Supreme Court rejected an ex post facto challenge to Kansas's SVP statute. (*Id.* at pp. 361–369, 370–371 [138 L.Ed.2d at pp. 514-519, 520-521.) The Supreme Court instructed that a state Legislature's stated intent regarding the purpose of a civil commitment statute is an important starting point in determining whether that statute is intended to punish SVP's, and courts should ordinarily defer to a legislative statement that the statute is not penal in nature. (*Id.* at p. 361 [138 L.Ed.2d at pp. 514-515.) Nevertheless, an appellant is not precluded from showing that the statute is so punitive either in purpose or effect as to negate the Legislature's stated intent. (*Ibid.*) In attempting to do so, however, the appellant bears a heavy burden. (*Ibid.*)

In *Hubbart*, *supra,* 19 Cal.4th 1138, the California Supreme Court noted that in enacting the SVPA, "the Legislature disavowed any 'punitive purpose[],' and declared its intent to establish 'civil commitment' proceedings in order to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior." (*Id.* at p. 1171.) The court further noted that "[t]he Legislature also made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.'" (*Ibid*.) Based on these considerations and others, the court concluded that the Legislature "intended a nonpenal 'civil commitment scheme designed to protect the public from harm.'" (*Id.* at p. 1172.)

Although McNary acknowledges *Hubbart* rejected the ex post facto challenge to the pre-Proposition 83 version of the SVPA, he nevertheless argues that Proposition 83 evinced a punitive purpose and its amendment of the SVPA makes it punitive in purpose and effect and therefore violates the federal constitutional prohibition against ex post facto laws. In particular, he argues the Office of the Legislative Analyst prepared an analysis describing the comprehensive package of reforms included in Proposition 83, which analysis referred to amendments to the Penal Code increasing the punishment for sex offenses. However, any Penal Code amendments made by Proposition 83 that increased the punishment for various sex offenses have little, if any, relevance to the purpose or effect of Proposition 83's amendments to the Welfare and Institutions

Code regarding civil commitments of SVPs (e.g., amends. of §§ 6604 & 6605). Although both provisions were included within the comprehensive Proposition 83 package of reforms, the express punitive purpose of amendments to Penal Code criminal offenses does not show the voters had the same purpose in amending the civil commitment provisions of the SVPA. We are not persuaded that "[t]he voters would understand Proposition 83 as a punitive measure designed to increase the period of time sex offenders are held in custody[,]" to the extent Proposition 83 amended the SVPA's civil commitment provisions for SVPs.

McNary alternatively argues that, applying the seven-factor test set forth in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 [9 L.Ed.2d 644] (*Kennedy*) to Proposition 83's amendments to the SVPA, the effect of those amendments is punitive. We are not persuaded the application of that test shows the purpose and effect of the amendments to the SVPA were punitive and prevail over their stated nonpunitive legislative intent.[8] Although the SVPA, as amended, provides for an indeterminate term of civil commitment (§ 6604), that term is not comparable to an indeterminate prison term, which has historically been considered punitive. On the contrary, *Hendricks* concluded the restriction of the freedom of the dangerously mentally ill was

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[8] Although the seven factors set forth in *Kennedy* are useful guideposts, they are not dispositive of the question whether a statute violates the prohibition against ex post facto laws. (*Smith v. Doe* (2003) 538 U.S. 84, 97 [155 L.Ed.2d 164, 179-180].)

"a legitimate nonpunitive governmental objective and has been historically so regarded." (*Hendricks, supra*, 521 U.S. at p. 363 [138 L.Ed.2d at p. 516].) Regarding Kansas's SVP act, the high court stated: "Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." (*Ibid.*)

Therefore, although the amended SVPA provides for an indeterminate term, that term's duration is linked not to punishment, but to its stated purpose of treating the committed person and protecting the public from those persons who currently are SVPs. Because there are procedures for release of a committed person who no longer is an SVP (e.g., §§ 6605, 6608), the indeterminate term provided by section 6604 does not show the amended SVPA is now punitive. Accordingly, Proposition 83's amendments to the SVPA do not require a different conclusion than reached by the California Supreme Court in *Hubbart*. (*Hubbart, supra*, 19 Cal.4th at pp. 1176–1177.) Furthermore, the amendments to the SVPA do not show its purpose or effect is retribution or deterrence. (*Hendricks, supra,* 521 U.S. at pp. 362–363 [138 L.Ed.2d at pp. 515-516]; *Hubbart, supra,* at p. 1175.) The SVPA's use of a person's past criminal convictions does not show the SVPA has a punitive purpose or effect. (Cf. *Hubbart, supra,* at p. 1175 ["[T]he SVPA . . . does not implicate ex post facto concerns insofar as pre-Act crimes are used as evidence in the SVP determination"].) None of the

other Proposition 83 amendments to the SVPA show a punitive purpose or effect.[9] We conclude, like the court in *Hubbart*: "[McNary] has not demonstrated that the SVPA imposes punishment or otherwise implicates ex post facto concerns." (*Hubbart, supra*, at p. 1179.)

C. Equal Protection:

McNary contends his indeterminate commitment violates his right to equal protection. He contends an SVP is similarly situated with those committed under Penal Code section 2960 et seq. as mentally disordered offenders (MDO's) and those committed after a finding of not guilty by reason of insanity (NGI). Because we find SVPs are not similarly situated to either group, we reject the equal protection argument.

"The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law. [Citations.] If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.] The question is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'

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[9] The change in the definition of an SVP from a person convicted of a sexually violent offense against one, rather than two victims (§ 6600, subd. (a)(1)) and the change in the definition of a sexually violent offense to include additional offenses (§ 6600, subd. (b)) do not show the amended SVPA's purpose or effect is punitive so as to require a different conclusion.

[Citation.]" (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

We find significant differences between SVPs, MDOs and NGI acquittees.

SVPs and MDOs differ with respect to their amenability to treatment. "[T]he MDO law targets persons with severe mental disorders that may be kept in remission with treatment (Pen. Code, § 2962, subd. (a)), whereas the SVPA targets persons with mental disorders that may never be successfully treated (Welf. & Inst. Code, § 6606, subd. (b))." (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1222.) "Given these contrasting backgrounds and expectations related to treatment, we cannot say the two groups are similarly situated in this respect for equal protection purposes." (*People v. Buffington, supra*, 74 Cal.App.4th at p. 1163.)

SVPs and NGI acquittees differ significantly in how they are committed in the first place. A person who is found not guilty because he or she was insane at the time of the crime is automatically committed, without an evidentiary hearing to determine if the person is still insane at the time of commitment. (Pen. Code, § 1026.) In contrast, a person cannot be committed under the SVPA until a trier of fact finds beyond a reasonable doubt that the person is an SVP. (§ 6604.) Given the disparate manner in which SVPs and NGI acquittees are committed in the first place, we conclude that SVPs and NGI acquittees are not similarly situated for purposes of the laws governing judicial review of their commitments.

III.

McNary Is Not Entitled To Relief On The Ground That The Evaluations Supporting The SVP Petition Were Invalid As An "Underground Regulation"

McNary contends his commitment must be reversed because it was predicated on psychiatric evaluations that were prepared in accordance with a protocol that was not properly adopted as a regulation under the APA. McNary did not raise this claim in the trial court and has, thereby, forfeited his right to make the challenge here. (*People v. Medina* (2009) 171 Cal.App.4th 805, 817.) However, even if we were to reach the merits of his claim, we would conclude the legitimacy of his commitment is not undermined by any failure of the Department to follow APA requirements.

Some additional background regarding the SVPA's procedures is necessary for discussion of the issue.

The SVPA provides for the involuntary civil commitment of certain offenders who are found to be sexually violent predators. (§ 6600 et seq.; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 902.) To establish that an offender is an SVP, the prosecution must prove that the person (1) has been convicted of one or more of the enumerated sexually violent offenses against one or more victims and (2) has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. (§§ 6600, subd. (a)(1); 6604.)

The person's commitment under the SVPA follows the completion of a prison term (§ 6601, subd. (a); *Hubbart, supra,* 19 Cal.4th at p. 1145), and the process takes place in several stages, both administrative and judicial. The inmate's records are first screened by prison officials, who may refer the inmate to the Department for a full evaluation as to whether the inmate meets the criteria for commitment of an SVP under section 6600. (§ 6601, subd. (b).)

The Department must evaluate the offender in accordance with a "standardized assessment protocol, developed and updated by the [Department]," to determine whether the person is an SVP. (§ 6601, subd. (c).) The protocol requires "assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (*Ibid.*)

The Department's evaluation must be conducted by two practicing psychiatrists or psychologists or one practicing psychiatrist and one practicing psychologist designated by the director of the Department. (§ 6601, subd. (d).) If both evaluators agree that the offender has a diagnosed mental disorder and is likely to engage in acts of sexual violence without appropriate treatment and custody, the director of the Department (the director) must forward a request for a commitment petition to the county where the offender was convicted. (*Ibid.*)

If the county's legal counsel concurs with the director's recommendation, a petition for civil commitment is filed in the superior court (§ 6601, subd. (i)) and a judicial hearing is held to determine whether there is probable cause to believe the alleged SVP is likely to engage in sexually violent predatory criminal behavior upon release. If the court determines probable cause exists, it must order that a jury trial be held. (§§ 6602, subd. (a); 6603, subd. (a).)

At trial, the state has the burden of proving beyond a reasonable doubt that the person is an SVP. (§ 6604.) The SVP scheme affords numerous rights to the individual, including the right to assistance of counsel, the right to retain experts, and access to medical and psychological reports. (§ 6603, subd. (a.) As we have discussed, the SVPA was amended in 2006 to change the original two-year civil commitment of any person who was tried and found beyond a reasonable doubt to be an SVP to a commitment for an indeterminate term. (*Borquez, supra,* 156 Cal.App.4th 1275, 1280-1281.)

On August 15, 2008, the Office of Administrative Law (OAL) issued an opinion that concluded the Department's standardized assessment protocol for SVP evaluations met the definition of a "regulation" and therefore should have been adopted pursuant to the APA.[10] Requesting judicial notice of such opinion, McNary

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[10] 2008 OAL Determination No. 19, August 15, 2008 (OAL file No. CTU 2008-0129-01) <http://www.oal.ca.gov/determinations2008.htm>[as of Oct. 5, 2009].

argues his commitment must be reversed because the evaluations in his case were based on such protocol, which is an "underground regulation." We grant McNary's request for judicial notice of the opinion (Evid. Code, §§ 452, 459), but conclude he is not entitled to any relief. Nothing in the OAL's determination suggested that the Department's protocol was otherwise deficient or unreliable as an assessment tool.

The fact that the evaluation protocol may be an "underground regulation" does not warrant the reversal of defendant's commitment. The psychiatric evaluations prepared prior to the filing of a petition under the SVPA do not affect disposition of the merits of the petition, but instead serve only as a procedural safeguard to prevent meritless petitions from reaching trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063; *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130.) As we have outlined, once the petition is filed, a new round of proceedings is triggered. (*Hubbart, supra*, 19 Cal.4th at p. 1146.)

The statutory scheme does not require the People to prove the existence of these evaluations at either the probable cause hearing or the trial. (*People v. Superior Court (Preciado), supra*, 87 Cal.App.4th at p. 1130.) Once the petition is filed, the People need only prove the essential fact that the alleged SVP is a person likely to engage in sexually violent predatory behavior. (*Ibid.*)

Similarly, the only purpose of the probable cause hearing under the SVPA is to weed out groundless petitions by testing

the sufficiency of the evidence to support the SVPA petition. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 235, 247 (*Cooley*); *People v. Hayes* (2006) 137 Cal.App.4th 34, 43-44 (*Hayes*).) The hearing is analogous to a preliminary hearing in a criminal case. (*Cooley, supra*, at p. 247.) Once the court determines that there is probable cause as to each element necessary for an SVP determination, the matter proceeds to trial in the manner described above.

Consequently, challenges to a probable cause finding in an SVP proceeding are handled in the same manner as challenges to a preliminary hearing finding in a criminal case. (*Hayes, supra*, 137 Cal.App.4th at p. 51.) Irregularities are not considered jurisdictional (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 405) and reversal is required only if the defendant can show he or she was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. (*Hayes, supra*, at p. 50, relying on *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530.)

Here, McNary does not challenge the sufficiency of the evidence at either the probable cause hearing or at trial. Because the evaluations serve only to prevent meritless petitions from reaching trial (*People v. Scott, supra,* 100 Cal.App.4th at p. 1063; *People v. Superior Court (Preciado), supra,* 87 Cal.App.4th at p. 1130), and a trial was held in which the jury found beyond a reasonable doubt that McNary is an SVP, McNary has failed to establish any prejudice. His claim therefore fails.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

ROBIE, J.